Supreme Court, U.S.
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NO. 91-771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GENE MEYERS, NORMAN WYCHE,
ALDO EBERLE, and DONALD NORTHCUTT,
Plaintiffs-Petitioners,

v.

IDEAL BASIC INDUSTRIES, INC.,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit affirmance of judgment n.o.v. on Petitioner's malicious prosecution claim, which is grounded on settled Oklahoma common law, is supported by the record, and raises no unique, compelling conflicting issues, mandates denial of this Petition?

2. Whether, on Petitioners' malicious prosecution claim, the Tenth Circuit fully, fairly and accurately addressed and resolved all material issues raised in this Petition, thereby mandating summary denial of this Petition?

3. Whether Petitioners' failure to allege an abuse of judicial discretion mandates affirmance of the trial court's conditional grant of new trial?

4. Whether the Tenth Circuit order affirming dismissal of Petitioners' abuse of process claim, which involves application of Oklahoma common law to undisputed record facts, is supported by the record, and involves no unique, compelling or conflicting issues, mandates denial of this Petition?

5. Whether, on Petitioners' abuse of process claim, the Tenth Circuit fully, fairly and accurately addressed all material issues here raised as grounds for review, thereby mandating summary denial of this Petition?

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STATEMENT OF THE CASE

These Oklahoma common law claims arise from a 1988 lawsuit filed by the Ideal Basic Cement Company[1] (hereinafter "the Company" or "Ideal") alleging conspiracy (the "conspiracy claim") and naming Petitioners as defendants. Petitioners' Appendix pp. 2a, 3a (hereinafter cited as "App."). The conspiracy claim and Petitioners' various counterclaims were voluntarily dismissed in 1989, with the exception of Petitioners' malicious prosecution and abuse of process claims. Id.

The trial court dismissed the abuse of process allegations for failure to state a claim under Oklahoma law. App. 2a, 3a, 4a-6a. The malicious prosecution claim went to trial. The jury's verdict was for Petitioners. App. 2a, 3a.

On January 30, 1990, the trial court vacated that verdict and entered judgment n.o.v. for the Company. App. 2a, 3a-4a, 9a, 19a. The trial court held that uncontroverted evidence of reliance on counsel negated the prima facie element of "lack of probable cause", and established an absolute defense to malicious prosecution. App. 17a-19a. The trial court also found that the jury verdict was against the manifest weight of the evidence and reflected jury passion and prejudice. App. 21a-22a. In the absence of judgment n.o.v., a new trial was required. Id.

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[1] Ideal's inter-corporate structure is as follows: Ideal was merged into Holnam Inc. on or about March, 9, 1990. Holnam Inc. has one subsidiary not wholly-owned, St. Lawrence Cement, Inc. Holnam Inc. is owned by Holdernam Inc., which in turn is owned by Holderbank Financiere Glaris Ltd.

On appeal, the Tenth Circuit examined the dismissal and judgment n.o.v. issues de novo. App. 4a, 6a. The Court affirmed the trial court's orders in their entirety (App. 6a, 13a) and thereafter denied Petitioners' Motions for Rehearing and Rehearing En Banc.

REASONS FOR DENYING THE WRIT

This Petition raises issues and arguments identical to those presented to the Tenth Circuit. The Petition involves nothing more than the application of fundamental Oklahoma tort law to record facts. Petitioners seek Supreme Court review based upon nothing more than their disagreement with the Tenth Circuit assessment of the record and application of settled law.

The Tenth Circuit's affirmance of judgment n.o.v. on Petitioners' Oklahoma malicious prosecution claim was proper. Uncontroverted evidence established the Company's reliance on counsel as a complete defense and negated an essential element of malicious prosecution. Petitioners' inferences and opinions do not substitute for evidence; there is nothing to warrant further review.

As to the trial court's conditional grant of new trial, Petitioners never even attempt to meet their burden of showing that such was an abuse of discretion.

Petitioners' Oklahoma abuse of process claim was properly dismissed because they never pled any facts establishing that the Company's 1988 conspiracy claim against Petitioners constituted misuse of the judicial process for a purpose unwarranted by the

complaint. Alleged improper motive in filing is entirely insufficient to support their tort claim and the trial court and Tenth Circuit correctly so held.

Each and every argument proffered by Petitioners was fully, fairly and accurately reviewed by the Tenth Circuit. There is no issue of fact or law warranting further review. This Petition should be denied in its entirety.

STATEMENT OF RECORD FACTS

In 1987 and 1988, the Company's Ada Oklahoma plant became the target of serial acts of sabotage.[2] App. 3a, 8a, 11a. At the same time, workers' compensation claims were filed by twenty-five percent of the workforce, an unprecedented figure. Id. Management consulted with counsel specializing in labor matters and disclosed all facts known. App. 3a, 8a, 9a, 12a. Management did not know if it had any legal recourse or who, if any, among its employees might be involved in misconduct. App. 3a, 8a, 9a-10a, 11a-12a.

Management requested the lawyer to conduct an investigation. App. 3a, 12a. Counsel was given full access to Company personnel, records and facilities. App. 3a, 8a, 12a. After on-site investigation and off-site analysis, counsel advised the plant manager that facts disclosed by his investigation warranted the filing of a lawsuit. Id. Counsel identified Petitioners as the

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[2] Due to an impasse in collective bargaining negotiations, the plant's unionized employees, including Petitioners, had worked without a contract since 1984. App. 2a.

individuals to be named as defendants. App. 3a, 8a, 11a-12a. The Company had never singled out these four or suggested that they be targets of investigation. App. 8a, 11a-12a. The trial court found and Tenth Circuit confirmed uncontroverted evidence that, acting in reliance on counsel's conclusions and advice concerning the lawsuit and these Petitioners, the Company filed the 1988 conspiracy suit. App. 3a, 8a, 11a-12a, 16a-17a, 18a.

Petitioners disagree with the trial court and Tenth Circuit, and insist that the Company had specific information that should have alerted it that the lawyers' conclusions regarding these four Petitioners were erroneous. Petition for Certiorari, pp. 10-13, 18-19 (hereinafter cited as "Pet."). The Tenth Circuit fully considered that argument and held that there was no proof of Company notice of exonerating circumstances:

> . . . Mr. Sauer [general manager and decision-maker] did not possess any evidence as to the Appellants, nor did he encourage or suggest these Appellants be named. Mr. Sauer clearly testified his decision to bring the lawsuit against the four Appellants was made in reliance upon the investigation and advice of counsel. No evidence exists in the record to suggest otherwise. . . . Mr. Sauer was entitled to assume Mr. Kruger [the Company's counsel] considered all relevant information in making his recommendation as to the existence of sufficient factual and legal basis to bring

> a lawsuit against these four Appellants. Ideal did not know anything about these Appellants that would have alerted them to a concern as to the propriety of Mr. Kruger's recommendation.

App. 11a-12a (emphasis in original).

Petitioners have pointed to what they consider the Company's "body of knowledge" which they believe should have convinced the Company of their innocence. Pet. 10-13, 18-19. Petitioners' own version of this information contains nothing which would necessarily remove these four from any possible participation in the conspiracy alleged. And, this "body of knowledge" was made fully available to the attorney. App. 3a, 8a, 12a. The Tenth Circuit held that the company was entitled to rely on the attorney's assessment of this information in making his analysis and recommendation to the Company. App. 11a-13a.

There was no evidence to impeach or contradict management's unequivocal testimony that it retained counsel, requested an investigation, and thereafter acted in accord with and in reliance on counsel's advice. App. 3a, 8a, 9a, 11a-12a.

Concerning the abuse of process claim, the Petitioners' complaint alleges that the Company's "improper purpose" in filing the 1988 conspiracy claim was to interfere with legitimate workers' compensation claims and obtain labor concessions. App. 4a-5a, 37a-38a. The trial court pointed out that the legitimacy of the workers' compensation claims and labor tactics were cornerstones of the underlying 1988 conspiracy claim. App. 38a. Such matter, fully within the four

corners of the original complaint, could not be labelled a collateral "improper purpose"; it could not sustain an abuse of process claim. Id. The Tenth Circuit affirmed, citing the body of the case law establishing that alleged ulterior motive in filing suit, even if taken as true, is entirely insufficient to state an Oklahoma abuse of process claim. App. 4a-6a.

By order of November 14, 1991, the Tenth Circuit denied Petitioners' Motions for Rehearing and Rehearing En Banc. This Petition for Certiorari followed.

ARGUMENT

A. JUDGMENT N.O.V. STANDARDS WERE PROPERLY APPLIED.

Petitioners attempt to present a federal question by arguing that Fed.R.Civ.P. 50(b), authorizing judgment n.o.v., denied Petitioners' seventh amendment right to a jury trial. This contention has been explicitly rejected by this Court. Neely v. Eby Constr. Co., 386 U.S. 317, 321, 18 L.Ed.2d 75, 80 (1967), citing Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 85 L.Ed. 147 (1940). Moreover, the Tenth Circuit considered and rejected Petitioners' Seventh Amendment argument. App. 6a-7a. Petitioners' attempt to transform an Oklahoma state law question into a federal constitutional question for purposes of this Petition, must fail.

Under Oklahoma's law of malicious prosecution, reliance on counsel is more than an affirmative defense; such evidence negates the prima facie element

of lack of probable cause. Lewis v. Crystal Gas Company, 532 P.2d 431, 433 (Okla. 1975). Where reliance on counsel is uncontroverted, the malicious prosecution claim fails; judgment for defendant is required based on the plaintiff's failure of proof. Id. See also Williams v. Frey, 78 P.2d 1052 (Okla. 1938).

Federal evidentiary prerequisites governing entry of judgment n.o.v. are settled. Failure of a prima facie element signals failure of the claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L.Ed.2d 265 (1986). Under such circumstances, judgment n.o.v. is required. E.E.O.C. v. Sperry Corp., 852 F.2d 503 (10th Cir. 1988) (plaintiff's theories unsupported by sufficient evidence; trial court erred in denying JNOV). Where uncontroverted evidence establishes an affirmative defense, judgment n.o.v is required. Ford Motor Credit Co. v. Milburn, 615 F.2d 892, 897 (10th Cir. 1980) (trial court erred in refusing JNOV in favor of party with burden of proof); Continental Oil Co. v. Natrona Service, Inc., 588 F.2d 792, 799-800 (10th Cir. 1978) (upholding directed verdict and JNOV for party with burden of proof).

The instant Tenth Circuit decision fully comports with federal judgment n.o.v. standards and governing Oklahoma law. There is no basis whatsoever for further review. This Petition should be summarily rejected in its entirety.

B. TENTH CIRCUIT CONSIDERED AND REJECTED EACH CHALLENGE TO JUDGMENT N.O.V.; THERE IS NO BASIS FOR FURTHER REVIEW.

1. Uncontroverted Evidence Of Reliance Negated Malicious Prosecution; Such Could Not Be Ignored.

The Tenth Circuit held that evidence establishing disclosure of all known facts and good faith reliance on counsel was entirely uncontroverted. App. 9a, 11a-12a, 13a. The instant Petition sets forth nothing more than Petitioners' disagreement with the Tenth Circuit, based upon their own partisan opinions, inferences and speculations. Such are wholly insufficient to overcome the plain uncontroverted evidence. Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 216, 51 S.Ct. 453, 456-457, 75 L.Ed. 983 (1931); Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982) ("an inference is not reasonable if it is 'only a guess or a possibility,' unsupported by evidence").[3]

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[3] This record mirrors Williams v. Frey, 78 P.2d 1052 (Okla. 1938). There, as here, the evidence affirmatively established disclosure of known facts to counsel; and action in accord with counsel's advice. In Williams, plaintiff's inferences and skepticisms proffered to refute reliance were flatly rejected. Id. at 1055.

The significance of uncontroverted, unimpeached evidence is settled law; such must be taken as true:

> [T]his testimony standing uncontradicted, unimpeached, and not discredited by cross-examination must be taken as true.

Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 500 (10th Cir. 1984); see also Stafos v. Missouri Pacific Railroad Co., 367 F.2d 314, 317 (10th Cir. 1966) ("controlling, positive, uncontradicted and unimpeached evidence may not be disregarded even though adduced from interested witnesses; the trier of fact is bound to honor it"); Ford Motor Credit Co. v. Milburn, 615 F.2d 892, 897 (10th Cir. 1980) (uncontradicted, unimpeached testimony required judgment n.o.v.); Selle v. Gibb, 567 F. Supp. 1173 (N.D. Ill. 1983), aff'd, 741 F.2d 896 (7th Cir. 1984) (jury verdict could not be reconciled with uncontradicted and unimpeached defense testimony; judgment n.o.v. required).

The trial court and Tenth Circuit found uncontroverted evidence that Company management disclosed all known facts; gave counsel full access to Company data; and received and relied on counsel's advice. App. 3a, 8a, 9a, 11a-12a, 16a-17a, 18a-19a. These facts constitute good faith reliance, which is a complete defense to malicious prosecution in Oklahoma. Lewis v. Crystal Gas Company, 532 P.2d 431, 433 (Okla. 1975); Thompson v. Inman, 482 P.2d 927, 939 (Okla. 1971); Missouri, Kansas & Oklahoma Coach Lines v Meister, 330 P.2d 579, 582 (Okla. 1958).

In Oklahoma, a party is entitled to rely on counsel because counsel is the "better judge" of

whether known facts warrant litigation. Williams v. Frey, 78 P.2d 1052, 1057 (Okla. 1938). A charging party is fully entitled to rely on counsel's investigation and evaluation of the underlying facts. Herrick v. Devorak, 155 P. 1153, 1154 (Okla. 1916).[4] Under such circumstances, the party is not obliged to undertake its own investigation of the facts, or second guess the attorney's conclusions. Williams, 78 P.2d at 1057.

In full accord with the record and governing Oklahoma tort law and federal j.n.o.v. standards, the trial court and Tenth Circuit held that uncontroverted proof of reliance on counsel disposed of the malicious prosecution claim. Governing authorities and uncontroverted evidence fully support their conclusions. There is no basis whatsoever for further review. The instant Petition should be summarily denied.

2. On-Point Oklahoma Law Establishes The Sufficiency Of The Disclosure Evidence.

Petitioners contend that disclosure to counsel was inadequate because information concerning "these Petitioners" was not assembled and evaluated by the Company. Pet. 20-21. The identical argument was rejected by the trial court and the Tenth Circuit. App. 11a-12a, 16a, 17a-18a.

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[4] See also Missouri, Kansas & Oklahoma Coach Lines v. Meister, 330 P.2d 579, 582 (Okla. 1958) (the charging party secured the personal presence of an attorney and relied on his counsel's investigation; the charging party "did all that could reasonably be expected").

The uncontroverted fact, confirmed by the Tenth Circuit, is that at the time counsel was consulted and directed to investigate, the Company had never identified "these men". Id. The Company had no reason to assemble information particular to them. Counsel had full access to the universe of Company information regarding "these men". App. 3a, 8a, 12a. The Company was entitled to rely on counsel's evaluation of such data, and counsel's opinion that facts warranted litigation against them.[5]

In Oklahoma, the disclosure required for reliance on counsel means "known facts" bearing on the matter at hand. Lewis v. Crystal Gas Co., 532 P.2d 431, 433 (Okla. 1975). Disclosure is satisfied if the reporting party states his knowledge and makes any additional documentary evidence available. Missouri Kansas & Oklahoma Coach Lines v. Meister, 330 P.2d 579, 582 (Okla. 1958).

Oklahoma has considered and refused to impose an affirmative duty of diligent inquiry or investigation on the party relying on counsel. Williams, 78 P.2d at 1057. In Williams, the charging party testified that "I told [counsel] all the circumstances . . . that I knew." 78 P.2d at 1055. That testimony was sufficient to establish full disclosure and support reliance on counsel.

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[5] See also Donaldson v. Miller, 72 P.2d 853, 855 (Idaho 1937) (where independent investigation of counsel is undertaken at request of charging party, the charging party "would not be liable as for malicious prosecution even though the prosecuting attorney's advice was unsound or erroneous. . . . [I]f any mistake was made it was not the mistake of [the charging party]").

Here, the trial court and Tenth Circuit concluded that this record uncontrovertedly established full disclosure of the facts known to management. App. 12a, 18a-19a. Uncontroverted testimony established that these four were never identified by the Company. App. 11a-12a, 16a, 17a-18a. The Company relied on counsel's investigation, conclusions and advice. Id. On the disclosure issue, governing Oklahoma law was correctly applied. There is no basis for further review.

3. There Is No Evidence That The Company Had Reason To Reject The Investigation, Analysis And Advice of Counsel; Petitioners' Inferences And Speculation Do Not Substitute For Evidence.

Petitioners ask this Court to review the Tenth Circuit's "single finding" that the Company "did not know anything about [Petitioners] that would have alerted them to a concern as to the propriety of Mr. Kruger's recommendation." Pet. 17-18. Petitioners point to Company records concerning "these Petitioners" and claim that the Company had reason to know that they were innocent and should not be sued. Pet. 18-19. In fact, the "body of knowledge" recited in this Petition does not contain any exculpatory fact which would constitute notice that the attorney's advice was in error. Moreover, this "body of knowledge" was

made fully available to counsel, and the Company was entitled to rely on counsel's evaluation:

> Mr. Sauer was entitled to assume Mr. Kruger considered all relevant information in making his recommendation as to the existence of sufficient factual and legal basis to bring a lawsuit against these four.

App. 12a. See Lewis, 532 P.2d at 434; Williams, 78 P.2d at 1057.[6] Petitioners' opinionated and speculative disagreement with the Tenth Circuit is no basis whatsoever for further review. This Petition should be denied.

4. Petitioners' "Hostility" Theory Fails To Present A Fact Question.

Additionally, Petitioners argue that Supreme Court review is required because they believe the record establishes the Company and/or its manager were hostile to the workforce. Pet. 22-24. Even if such innuendo could be properly raised, such is wholly insufficient to create a fact question regarding reliance. The Oklahoma Supreme Court's decision in Page v.

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[6] Petitioners argue that the Tenth Circuit decision is error because these was no evidence linking these Petitioners to a sabotage. Pet. 13, 19-20. The contention is meritless; the attorney conducted the investigation, factually identified these Petitioners as participants in a labor conspiracy and advised the Company concerning the legal theories to be asserted. As a matter of Oklahoma law, the Company was entitled to rely on counsel's advice concerning the sufficiency of facts to warrant litigation.

Rose, 546 P.2d 617, 622 (Okla. 1975) is directly on point:

> Assuming that malice entered into [defendants'] actions in this situation or even prompted a vigilance . . . they might not otherwise have undertaken . . . [such] does not establish lack of probable cause.

Id. The Company's reliance on counsel stands uncontroverted. Nothing warrants further review. This Petition should be denied in its entirety.

C. THERE IS NO BASIS TO REVIEW CONDITIONAL GRANT OF A NEW TRIAL; PETITIONERS NEVER ATTEMPTED TO SHOW AN ABUSE OF DISCRETION.

Extreme deference is accorded a trial court's ruling on motion for new trial. Houtz v. General Bonding & Insurance Co., 235 F.2d 591 (10th Cir. 1956) (although judgment n.o.v. reversed, order for a new trial affirmed). Absent a showing of abuse, the trial court's ruling will not be disturbed. Harris v. Quinones, 507 F.2d 533 (10th Cir. 1974); see also Community National Life Ins. Co. v. Parker Square Savings and Loan Assn., 406 F.2d 603, 605 (10th Cir. 1969) ("[t]he trial judge is best equipped to apply the standard enunciated"); Poole v. Leone, 374 F.2d 961, 963 (10th Cir. 1967) ("motion for a new trial is addressed to the sound discretion of the trial court").

The trial court is in the best position to determine whether a jury's verdict is excessive or

influenced by passion or prejudice. Its judgment will be disturbed only if the record manifests a gross abuse. See, e.g., Worsham v. City of Pasadena, 881 F.2d 1336, 1338 (5th Cir. 1989); Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 410-411 (8th Cir. 1976); Holmes v. Wack, 464 F.2d 86, 89 (10th Cir. 1972). Here, Petitioners never even attempt to argue the presence of abuse.

Petitioners contend that assessment of damages is the exclusive province of the jury.[7] Petitioners fail to comprehend that the responsibility and duty to set aside the jury's verdict as excessive, the product of passion, and/or against the weight of the evidence, is the exclusive province of the trial court. Whitely v. OKC Corp., 719 F.2d 1051, 1058 (10th Cir. 1983); Holmes v. Wack, 464 F.2d 86, 89 (10th Cir. 1972). Such judicial responsibilities are no invasion of the jury system. Id.

Where the court determines that passion or prejudice influenced the jury, a new trial on all issues is required. Malandris v. Merrill Lynch, Pierce, Fenner & Smith, 703 F.2d 1152, 1168 (10th Cir. 1981) (remittitur not proper; absent judgment n.o.v., a new trial is required).[8] The trial court's finding of passion

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[7] O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987), provides no authority to overturn the trial court's new trial ruling. In O'Gilvie, there was no trial court finding of excessiveness and no Tenth Circuit application of the abuse of discretion standard.

[8] See Minneapolis St. P. & S.S.M. Ry. Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501 (1931) (no verdict can stand which is, in any degree, the result of passion and prejudice); Wells v. Dallas

or prejudice is afforded great deference; it may be disturbed only upon a showing of abuse of discretion. Worsham v. City of Pasadena, 881 F.2d 1336, 1338 (5th Cir. 1989).

Petitioners never attempt to identify any facts to suggest that the district court's conditional grant of a new trial constituted an abuse of discretion. Petitioners present no legitimate basis for this Court's further review. This Petition should be summarily rejected.

D. THE ABUSE OF PROCESS CLAIM WAS PROPERLY DISMISSED. NOTHING WARRANTS FURTHER REVIEW.

In affirming the dismissal of Petitioners' abuse of process claim, the Tenth Circuit focused on the third element of Oklahoma abuse of process which requires pleading of:

> [s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . .

Independent School District, 793 F.2d 679, 683 (5th Cir. 1986) (remittitur from $1.9 million to $250 thousand insufficient; new trial required); Rosersa v. International Harvester Co., 109 F.R.D. 143, 152 (E.D. Wis. 1986) ("it is unmistakably clear that remittitur may not be employed to cure . . . an excessive verdict that resulted from passion, prejudice, or caprice").

Tulsa Radiology Assoc. v. Hickman, 683 P.2d 537, 539 (Okla. App. 1984), citing Prosser, Handbook of the Law of Torts, § 121 (4th ed. 1971); App. 4a, 37a.

The instant abuse of process claim is grounded on Petitioners' allegation that the 1988 conspiracy case was filed with the objective of "intimidating . . . employees . . . into an abandonment of their legitimate Workers' Compensation claims." App. 5a (emphasis added). The trial court fully recognized that the legitimacy of workers' compensation claims was a pivotal issue in the conspiracy case. App. 38a. Petitioners have never alleged facts to demonstrate that the Company misused the court's process for a purpose unrelated to such conspiracy issues:

> There is no showing that Ideal was using its lawsuit for a coercive purpose to obtain an advantage that was collateral to the lawsuit itself.

Id. (emphasis in original).

Abuse of process requires more than an allegation that the charging party had an ulterior motive in filing the litigation. Lodges 743 and 1746 v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976). In Lodges 743, a union alleged that an employer filed a lawsuit to force the union to withdraw certain unfair labor charges. Id. at 464. The pleading failed to allege "action . . . to utilize the court's process . . . for collateral purposes not related to the suit in question." Id. at 465. Alleged wrongful motive or intent did not render the

litigation an abuse of process; such allegation could not sustain a claim.

In Tulsa Radiology Assoc. v. Hickman, 683 P.2d 537, 539 (Okla. App. 1984) the Oklahoma Court of Appeals reiterated that alleged bad intent does not state an abuse of process claim:

> [T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

Hickman, 683 P.2d at 539, quoting Prosser, Handbook of the Law of Torts, § 121 (4th ed. 1971) (emphasis added). See also Blue Goose Growers, Inc. v. Yuma Groves, Inc., 641 F.2d 695, 697 (9th Cir. 1981) (initiation of lawsuit and pursuit of discovery process based upon ulterior motive insufficient to support abuse of process); Rodriguez v. Carroll, 510 F. Supp. 547, 553 (S.D. Tex. 1981) ("[i]ssuance of process with malicious intent or without probable cause . . . is not actionable").[9]

In Houghton v. Foremost Financial Services Corp., 724 F.2d 112 (10th Cir. 1983), abuse of process was grounded on litigation allegedly undertaken for an illegal purpose entirely remote from the issues framed by the underlying replevin complaint. Here, the

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[9] In Tappan v. Ager, 599 F.2d 376 (10th Cir. 1979), the Tenth Circuit applied Kansas principles identical to Oklahoma abuse of process law and explained that the element of ulterior purpose is satisfactory only if "the ulterior purpose or motive . . . exist[s] outside of the process itself." Id. at 379-80.

"legitimacy" of workers' compensation claims was a cornerstone issue of the underlying action. The Petitioners never alleged any improper motive "collateral" to the original lawsuit.

Here alleged ulterior motive involves legitimacy (or illegitimacy) of workers' compensation claims. Such is inextricably linked to the crux of the underlying case. As such, it is legally insufficient to state an abuse of process claim. The cause of action was properly dismissed.[10] Nothing warrants further review.

The facts governing this abuse of process claim are entirely undisputed. The Tenth Circuit carefully evaluated the body of Oklahoma authorities, and reiterated and applied governing axioms. App. 6a. The Tenth Circuit fully addressed and correctly decided

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[10] Sage Intern. Ltd. v. Cadillac Gage Co., 556 F. Supp. 381 (E.D. Mich. 1982), is on point. There, the ostensible purpose of the underlying lawsuit was to stop unlawful competition. Plaintiff's abuse of process claim alleged that the "ulterior purpose" was to stop all competition, lawful or unlawful. The alleged "ulterior purpose" was inextricably linked to a disputed issue in the original claim; it could not support an abuse of process claim:

> Defendants' ostensible purpose in the [underlying] action was to prevent plaintiffs from competing with defendants through the use of defendants' trade secrets and proprietary information. Defendants' alleged ulterior purpose was to prevent plaintiffs from competing at all. This is not a collateral purpose . . . because such a purpose is indistinguishable from that of the ostensible purpose . . . .

Id. at 389.

this Oklahoma tort law question. There is no fact or circumstance warranting further review. The record and governing authorities mandate that this Petition be denied in its entirety.

CONCLUSION

For all the reasons herein stated based upon dispositive Oklahoma and federal standards, this cause was fully, fairly and accurately decided by the Tenth Circuit Court of Appeals. This Petition raises no compelling issues which would, in any manner, warrant further review. This Petition should be summarily rejected in its entirety.

Respectfully submitted,
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